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TRANSCRIPT OF PROCEEDINGS

JUN - 1 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
OFFICE OF THE SECRETARY

IN RE:
APPLICATIONS OF
GAF BROADCASTING CO., et al.
New York, New York

MM DOCKET NO. 93-54

The above-entitled matter came on for a pre-hearing conference pursuant to Notice before Judge Joseph Chachkin, Administrative Law Judge, at 2000 L Street, N.W., Washington, D.C., 20554, in Courtroom No. 4, on Friday, May 14, 1993 at 9:06 a.m.

APPEARANCES:

On Behalf of GAF Broadcasting Company, Inc.

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On behalf of Class Entertainment & Communications, L.P.

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On behalf of The Fidelio Group, Inc.

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1 On behalf of the Mass Media Bureau

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P R O C E E D I N G S

1
2 JUDGE CHACHKIN: Good morning. Let's go on the record.
3 This proceeding concerns applications of GAF Broadcasting
4 Company, Inc. for renewal of license of station WNCN(FM) in
5 New York and two competing applications. They are Class
6 Entertainment and Communications, L.P. and Fidelio Group, Inc.
7 May I have the appearances on behalf of the parties? On
8 behalf of GAF Broadcasting Company, Inc.?

9 MR. FLEISCHMAN: Aaron Fleischman, and my colleagues
10 Arthur Harding and Chris Wood, all from Fleischman & Walsh.

11 JUDGE CHACHKIN: On behalf of Class Entertainment and
12 Communications, L.P.?

13 MR. SCHAUBLE: Good morning, Your Honor, John J.
14 Schauble and Lewis I. Cohen of Cohen & Berfield, P.C.

15 JUDGE CHACHKIN: On behalf of the Fidelio Group, Inc.?

16 MR. COLE: Harry Cole, of the firm of Bechtel & Cole,
17 Chartered.

18 JUDGE CHACHKIN: On behalf of the Chief, Mass Media
19 Bureau?

20 MR. GOLDSTEIN: Norman Goldstein and Gary Schonman.

21 JUDGE CHACHKIN: I issued an order which was released
22 March 31st, 1993, in which I required the parties to get
23 together and try to reach some stipulations and explore dates
24 for proposed discovery as well as other, other aspects --
25 procedural aspects of this proceeding.

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1 I received a letter dated May 6th, 1993, which sets
2 forth some of the procedures the parties want to follow in
3 connection with discovery. And what is proposed here is that
4 the parties -- the applicants have agreed to file joint and
5 supplemental motions, production of documents within 20 days
6 after the pre-hearing conference and that date would be
7 June 3rd. And the parties also have agreed that production of
8 documents would take place within 45 days after issuance of an
9 order by the presiding judge. And the parties -- the
10 applicants have also agreed to file their initial notices of
11 deposition within 20 days after the pre-hearing conference.

12 The statement -- the letter further recites that it is
13 anticipated that the taking of depositions will commence in
14 August at times and places to be agreed upon by, by the
15 parties. It further states that counsel will be prepared to
16 more fully address the -- this proposed schedule at the pre-
17 hearing conference.

18 Have the parties reached some stipulation as to
19 procedural dates?

20 MR. HARDING: Well, Your Honor, if I might, as a
21 preliminary matter I'd like to -- we're going to be filing
22 this letter today regarding a agreement of settlement between
23 GAF and Class Entertainment that would look to the dismissal
24 of Class's competing application and we would hope to be in a
25 position to file documents in support of his settlement within

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1 one week.

2 JUDGE CHACHKIN: I thought under the Commission's
3 procedures there -- reimbursement wasn't allowed? Am I wrong?
4 I thought competing applications could not receive monetary
5 consideration for dismissing their application --

1 JUDGE CHACHKIN: I thought I'm the one who passes on
2 settlement agreements. Am I wrong?

3 MR. HARDING: Well, we would defer to counsel for Class
4 since it's really their issue.

5 JUDGE CHACHKIN: Well, they could, they could address
6 the matter if they wish right now. But what is the basis for
7 belief that the Commission is going to waive its rules and
8 allow reimbursement where you've challenged the renewal
9 applicant? What is the basis for that?

10 MR. SCHAUBLE: Well, Your Honor, there -- the
11 settlement agreement would involve not only the, the
12 resolution of, of the portion of the proceeding that is before
13 Your Honor, before Your Honor, but also other pending
14 litigation. As Your Honor, as Your Honor probably knows, a
15 petition to deny was filed by Class against the renewal
16 application of GAF Broadcasting Company and the Commission's
17 substantive ruling denying that petition to deny was mostly
18 contained not in the hearing designation order but in a
19 separate order that was earlier issued by the Commission.
20 Class has taken a notice of appeal to the U.S. Court of
21 Appeals of the ruling on the petition to deny.

22 Now, under the Commission's rules petitions to deny
23 against renewal applications, reimbursement is allowed for
24 legitimate and prudent expenses. There was also another
25 portion of this proceeding, the allegations concerning the EEO

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1 record of GAF which is not before Your Honor but has been
2 referred to the Mass Media Bureau's EEO Branch for further
3 consideration.

4 JUDGE CHACHKIN: I thought that the potential
5 intervener was the one who was pressing that matter. Am I
6 wrong?

7 MR. SCHAUBLE: Well --

8 JUDGE CHACHKIN: I didn't know Class was the one that
9 was pressing it.

10 MR. SCHAUBLE: There were certain predesignation
11 pleadings that were filed concerning EEO matters.

12 JUDGE CHACHKIN: But you didn't initiate the --
13 apparently the complaints about employment discrimination did
14 you?

15 MR. SCHAUBLE: We did not initiate the complaints,
16 that's correct.

17 JUDGE CHACHKIN: I mean you filed some comments? Is
18 that what you're saying?

19 MR. SCHAUBLE: I believe that's correct, Your Honor.

20 JUDGE CHACHKIN: But, but what's -- are you saying the
21 \$80,000 covers -- it, it is just exclusively for, for the
22 matter pending in the Court of Appeals and doesn't at all
23 involve any amounts involved in prosecuting your application
24 here? Is that the point you're making?

25 MR. SCHAUBLE: I don't believe it -- you know, we

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1 haven't -- we don't --

2 JUDGE CHACHKIN: I mean, in other words are you saying
3 you don't need a waiver of the existing Commission rules,
4 requirements?

5 MR. SCHAUBLE: No, I, I, I think we probably, I think
6 we probably will need a waiver of the rule and we'll --
7 however, I think one of the, one of the arguments we would
8 make is that the, the -- you know, by allowing the
9 comprehensive settlement -- allowing, you know, the
10 comprehensive settlement of both the litigation relating the
11 petition to deny and this proceeding and to the extent that
12 expenses are relating to the petition to deny we believe that
13 would be a public interest factor supporting of a limited
14 waiver of, of the rules.

15 JUDGE CHACHKIN: How does the public interest benefit
16 -- Mr. Goldstein?

17 MR. GOLDSTEIN: I was just going to say is it
18 anticipated that the amount of settlement will be subject to
19 Commission approval, and if -- and if the Commission approves
20 any lesser amount the parties would be bound to that amount?

21 JUDGE CHACHKIN: Or approve no amount, let's take that
22 situation.

23 MR. GOLDSTEIN: Well, I was working my way down.

24 JUDGE CHACHKIN: All right. Well, we might as well
25 deal with reality.

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1 MR. GOLDSTEIN: That's certainly our understanding.

2 MR. SCHAUBLE: Well, Your Honor, if -- you know, if the
3 Commission does not approve the -- does not approve any
4 payment that would in essence be rejecting the agreement --

5 JUDGE CHACHKIN: No, it wouldn't.

6 MR. SCHAUBLE: -- and then the parties would --

7 JUDGE CHACHKIN: Would what?

8 MR. SCHAUBLE: -- go forward.

9 JUDGE CHACHKIN: Well, unless you could show me any
10 precedent, I'm not prepared to grant certainly any payments.
11 It -- the law is clear. I know there's a pending request for
12 waiver in another proceeding, perhaps we'll be some
13 enlightenment there, but if the Commission rejects that I
14 think that'll be clear that the Commission means what it says,
15 that it's not going to allow reimbursement --

16 MR. FLEISCHMAN: Your Honor?

17 JUDGE CHACHKIN: -- by -- to the challenges. Yes?

18 MR. FLEISCHMAN: Your Honor, as long as we've come this
19 far, the parties, that is GAF Broadcasting and, and Class
20 Entertainment, we would like to continue, make the filing and,
21 you know, we've come this far which we think is a, is a, is a
22 step that is in the public interests and make the filing and,
23 and let it be judged, you know, on, on the merits of what we
24 file.

25 JUDGE CHACHKIN: I, I don't -- well, you certainly can

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1 make your filing.

2 MR. FLEISCHMAN: And, and then --

3 JUDGE CHACHKIN: But, but there was a purpose that the
4 Commission that -- deciding not to reimburse these things, it
5 was meant that if challenges are serious about filing
6 competing applications then they should have to go through
7 with it and if they're not serious then they shouldn't file
8 one or, or expect to receive any kind of money which the
9 Commission felt was improper to, to, to permit them to be able
10 to reimburse -- if they're really serious they believe their
11 application would serve the public interest and should be
12 granted in lieu of the renewal of the applicant then they
13 should prepare to go through the entire process and not use a
14 challenging application as a means to obtain some funds --
15 some money by forcing a settlement. That was the Commission's
16 intent and I have seen nothing as of yet indicating that the
17 Commission intends to change its policy. But you can go ahead
18 and file what you want to file. Yes, Mr. Cohen?

19 MR. COHEN: Your Honor, I -- the last thing I'm going
20 to ever do is argue with you about that, but I think what,
21 what the intention of the parties is, and I'm, and I'm sort of
22 back-stopping for my partner Mort Berfield who's unavoidably
23 away today, I think it's our intention to file with the
24 Commission and ask the Commission to grant the, the relief and
25 we intend to make a substantial public interest argument.

1 taking into account all of the factors you've just mentioned.
2 And that's what the hope and intention of the parties is, to
3 file with the Commission.

4 JUDGE CHACHKIN: Mr. Goldstein?

5 MR. GOLDSTEIN: Is it anticipated that there will be
6 documentation showing that the \$80,000 is equivalent to the
7 amount expended on the case?

8 MR. SCHAUBLE: Yes, Your Honor, absolutely.

9 MR. COHEN: The \$80,000 will be well, will be well
10 documented, you can be certain of that, Mr. Goldstein. I
11 mean, we're aware of what the precedents are, we're aware of
12 what the law is so I mean we're not naive in this respect.

13 MR. GOLDSTEIN: No one is suggesting that, Mr. Cohen.

14 JUDGE CHACHKIN: Well --

15 MR. FLEISCHMAN: Your Honor, before we -- you know,
16 when we came to the conclusion of doing this we thought that
17 there was a substantial chance and a substantial likelihood
18 that we would get this, this grant. And in terms of the
19 public interest, we don't see where the public interest would
20 be served to have an applicant who is not interested in, in,
21 in proceeding forward and, and, and getting this license have
22 to go through the process of, of, you, you know, using all the
23 resources of everyone here and the Commission if, if in fact
24 the desire is no longer there to have the facility.

25 JUDGE CHACHKIN: But the point of the matter is, the

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1 solution is very simple: they could dismiss their application,
2 the question whether they should receive any monies for
3 dismissing their application, that seems to me the private
4 interest not the public interest is not benefiting.

5 MR. FLEISCHMAN: Well, the public interest though is,
6 is --

7 JUDGE CHACHKIN: Well, you could say the public
8 interest is always benefiting when the -- when you don't have
9 a hearing, when you avoid hearing, but under that
10 circumstances that the whole purpose for the Commission
11 adopting the procedure did -- would, would, would have --
12 would, would vanish.

13 MR. FLEISCHMAN: But it's further -- Your Honor,
14 it's -- and again, I'm not being argumentative, but it's
15 further served if, if the applicant doesn't want to have the
16 facility why make it go through a hearing where, where
17 everyone -- all the resources are wasted and then to have
18 something there that, that --

19 JUDGE CHACHKIN: Well, I, I, I said no one's compelling
20 the applicant to go through the hearing. The applicant can
21 dismiss its application anytime it wants. The question --
22 only question remains whether the applicant should be allowed
23 to be reimbursed to any extent -- as having initiated
24 proceeding in the first place, for having filed an application
25 and prosecuted it. That's the question. The Commission

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1 policy is pretty firm in that area and I assume the Commission
2 will have to determine whether they want to grant a waiver.
3 As I say, there is a pending case in another matter where
4 apparently a waiver request has been filed, at least that's
5 what I read in the press. I can't think of the circumstances
6 right now but there is something pending.

7 MR. HARDING: I believe, Your Honor, that there is no
8 formal papers on that matter.

9 JUDGE CHACHKIN: What matter is that, do you know?

10 MR. HARDING: NBC and WRC.

11 JUDGE CHACHKIN: Right, that's correct. The one, the
12 one involving Mr. Gadine (phonetic sp.) in Washington, D.C.,
13 apparently there's an attempt there by Mr. Gadine to also
14 receive a sum of money mainly consisting of his legal expenses
15 for his agreeing to dismiss its application is pending or
16 challenged -- application challenging the NBC affiliate in
17 Washington.

18 MR. FLEISCHMAN: But the circumstances there, Your
19 Honor, may be different from these circumstances.

20 JUDGE CHACHKIN: Why? What circumstances?

21 MR. FLEISCHMAN: Well, I don't know what the
22 circumstances are, but I mean there may be --

23 JUDGE CHACHKIN: Apparently it's the same situation of
24 which they're willing to dismiss the application if they're
25 reimbursed which brings us back to what the situation -- the

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1 policy existed prior to the Commission changing its policy. |

1 getting this into the record, your statement? You could
2 file --

3 MR. COLE: Well, I, I can submit it as -- with, with a
4 cover pleading just indicating this was distributed during the
5 pre-hearing conference and I'm submitting it so that the
6 record will have a copy of it.

7 JUDGE CHACKIN: But of course this has nothing to do
8 with the issues raised in the motion to dismiss and I assume
9 you're, you're defaulting as far as filing a response. That
10 dealt with the question of whether or not you could come up
11 with an antenna. You can get a manufacturer to submit a
12 statement saying that your antenna was feasible and you
13 haven't addressed that.

14 MR. COLE: I, I have not addressed that, Your Honor,
15 no.

16

1 to the extent that the hearing designation order addressed
2 those points, it in effect gave me the opportunity or gave
3 Fidelio the opportunity to make its case at hearing on those
4 issues. But as I say, you're, you're correct to the extent
5 that I have not responded to the motion to dismiss and to that
6 extent I have -- the record is -- has no, has no indication of
7 what Fidelio's position is in response.

8 JUDGE CHACHKIN: So, what, what do I gather from that,
9 that you, you have -- you, you, you're not going to --
10 apparently you haven't filed a response, you're not opposing
11 the motion to dismiss --

12 MR. COLE: To the extent it's a stay request we'd
13 oppose it.

14 JUDGE CHACHKIN: And so I mean we don't even get to the
15 stay request because the stay request has nothing to do with
16 the, the, the questions raised in the motion to dismiss. I
17 mean, there's no purpose for me to grant the stay request
18 because I'd have to dismiss your application anyway. So at
19 least you wouldn't be in a position to, to go forward with it.
20 I mean, if you address, address the -- if you had addressed
21 the concerns of the Commission concerning the engineering
22 matters then you would be in a position it seems to me to
23 argue for your stay request which I would have to consider on
24 the merits. But since you haven't addressed that there's
25 nothing for me to consider. This is moot.

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1 MR. HARDING: Your Honor, we would strongly agree with
2 that. Fidelio is in default by almost two months from, from
3 the HDO, the requirements, not only as to the antenna but as
4 to the filing of an environmental impact statement assessing
5 the RF radiation problems posed by its proposal, addressing
6 the historical landmark problems in its novel mounting of an
7 antenna on, on the Chrysler Building, as well as in default on
8 its response to our motion to dismiss, as well as in default
9 on its filing a notice of publication. Obvious from this
10 statement that they are not prepared to proceed forward in
11 prosecuting this case and we would urge you to proceed forward
12 on, on the merits of our motion to dismiss.

13 JUDGE CHACHKIN: Do you have any response, Mr. Cole?

14 MR. COLE: Well, Your Honor, I'm, I'm, I'm bound by
15 what my client has instructed me to distribute at the
16 hearing -- the pre-hearing and that's the statement and as I
17 understand Fidelio's position as indicated in the statement
18 they are not willing or prepared to proceed absent some stay
19 pending a disposition of the Court of Appeals matter.

20 JUDGE CHACHKIN: All right. Well then under those
21 circumstances I have no choice but to dismiss the
22 application -- and I will, will do so. So now we have a
23 situation where we started the hearing with two competing

24 applicants and apparently one of them is being dismissed and the

1 dismiss, and that's where we are.

2 MR. GOLDSTEIN: Your Honor, you -- is there not a
3 pending intervention request?

4 JUDGE CHACHKIN: There is a pending intervention
5 request, of course, I have to rule on that, but there may not
6 be a comparative renewal. Of course, if there are basic
7 issues it wouldn't make any difference, obviously we'd still
8 have to go forward, but if the two challengers leave and there
9 are no basic issues then that would in effect terminate the
10 hearing obviously.

11 MR. HARDING: And we think, Your Honor, that may -- the
12 Fidelio development may affect the settlement posture and, and
13 may provide an, an opportunity to -- in the context of a
14 global settlement of the case we think that your discretion or
15 the Commission's discretion may be somewhat different under
16 the settlement policy.

17 JUDGE CHACHKIN: What difference does it make if there
18 was one other applicant who filed on top? Either you have a
19 policy or you don't have a policy. Obviously, if, if the
20 Commission was concerned about settlements it wouldn't have
21 adopted the policy it did. Obviously, you felt there were
22 more important public interest considerations and, and that
23 was the reason they adopted the policy. Now, it doesn't
24 matter whether there's two competing applicants or one
25 competing applicant. I mean, that wouldn't make any

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1 difference.

2 MR. FLEISCHMAN: Sir?

3 JUDGE CHACHKIN: Yes?

4 MR. FLEISCHMAN: I, I may be missing something, but
5 again, if, if, if Fidelio leaves and we're left in a
6 comparative proceeding with, with an applicant, i.e. Class,
7 which doesn't want to have the facility and they're sort of
8 dragged along in this thing where they don't want it at the
9 end, then it doesn't seem to make any sense.

10 JUDGE CHACHKIN: Well, I don't know how you can say it
11 doesn't make any sense. If, if they don't want the facility
12 they could always dismiss their application or you can move to
13 dismiss them if you feel they're -- that they're abusing the
14 Commission's processes or they're not prosecuting the
15 application. There are vehicles short of providing funds to
16 them, the Commission had that in mind when they adopted the
17 policy and so I don't think it makes any difference whether we
18 have one other applicant or two other applicants or a dozen
19 other applicants frankly.

20 MR. FLEISCHMAN: Well, I'm hopeful that the proceeding

1 Bureau's position as well.

2 MR. GOLDSTEIN: I think that's a safe bet, Your Honor.

3 JUDGE CHACHKIN: All right, in lieu of these
4 interesting developments the next question is, is what do we
5 do about proceeding with discovery dates in the event that the
6 settlement agreement is not approved? And it's my intention,
7 frankly, to proceed with discovery.

8 MR. HARDING: We have no objection to that, Your Honor.

9 JUDGE CHACHKIN: And then the -- I guess Class will
10 have to come up with the choice of whether or not it's worth
11 it pursuing it with the additional expenses with the
12 understanding they may not receive anything or they truly
13 don't want to -- don't want the, don't want the station they
14 always have the choice of dismissing their application at this
15 stage. But I intend to proceed with discovery and
16 establishing a procedural schedule. Now, the parties have
17 suggested portions of the procedural schedule here. Has the
18 Bureau had a chance to -- well, apparently the Bureau received
19 a copy of this. Do you have any comments on the procedural
20 schedule or any ideas of their own for a procedural schedule?

21 MR. GOLDSTEIN: No, we, we were consulted and advised
22 of the schedule and we have no objection to whatever ruling
23 Your Honor will make.

24 JUDGE CHACHKIN: All right. Under the schedule,
25 motions production of documents -- June 3rd date is

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1 established for the filing of motion production of documents,
2 that date will be adopted. And depositions -- notices of
3 deposition within 20 days of the pre-hearing conference.

4 MR. SCHAUBLE: I believe that's also the June 3rd date,
5 Your Honor.

6 JUDGE CHACHKIN: Also the same date? All right. Now,
7 the parties described their production of documents will be 45
8 days after issuance of an order. What date did the party have
9 in mind for the actual taking of depositions? The date in
10 August? Is that --

11 MR. WOOD: Your Honor, we've anticipated it would be
12 mid-August at a place to be established in New York City.

13 JUDGE CHACHKIN: Mid-August? Well, what about the
14 second week of August? That seems to be enough time.

15 MR. HARDING: That's fine.

16 MR. SCHAUBLE: No objection, Your Honor.

17 JUDGE CHACHKIN: How about August 9th taking of
18 deposition?

19 MR. WOOD: Under this schedule, Your Honor, we would
20 have the documents by mid- to late-July and the mid-August
21 date would seem to make a lot of sense.

22 JUDGE CHACHKIN: Well, we have a date of -- of
23 August 9th so the depositions themselves -- the taking --
24 let's see, the taking of depositions is August 9th. The
25 documents obviously should be available before the taking of

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1 | depositions so it should be some day in July obviously. The
2 | normal rules are within 14 days. Is there some reason why
3 | we're asking for 45 days here?

4 | MR. WOOD: Yeah, Your Honor, if I may address that?

5 | JUDGE CHACKIN: Yes?

6 | MR. WOOD: Forty-five days would seem generous for the
7 | challengers given that we're talking about new companies which
8 | have recently been formed. For an incumbent licensee I think
9 | the typical situation is that document production will be
10 | quite burdensome. We're an ongoing business, we've had the
11 | station for a full license term. There's any number of

1 is only date in October. Let's say October 4th for a hearing. 1